KOK SWEE CHIN

v.

GENERAL FACTORING & CREDIT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI AHMAD MAKINUDIN J
[CIVIL SUIT NO: D3-22-456-2000]
23 MARCH 2004

MONEYLENDERS: *Interest - Excessive interest - Loan agreement - Whether defendant a moneylender exempted from provisions of Moneylenders Act 1951 - Whether defendant prohibited from collecting repayment - Whether plaintiff entitled to charge a higher interest than provided for in Moneylenders Act 1951 - Whether late payment charges irrecoverable - Whether plaintiff had waived and abandoned her rights - Moneylenders Act 1951, ss. 2A, 22(1)*

The plaintiff, in order to part finance the purchase of a condominium unit, had entered into a loan agreement with the defendant in which she assigned, as security for the loan, the said condominium to the defendant subject to the terms and conditions contained therein. The interests charged by the defendant for the loan were: (a) 14% per annum compound interest on monthly rests on all moneys advanced or released; and (b) default interest or late payment interest at 18% per annum compound interest in addition to (a) on the amount of each instalment.

The plaintiff claimed that the defendant did not have a moneylending licence, and even if it did, the defendant could not charge such interests because it was excessive and unconscionable. It also contended that the compound late payment interest was a penalty which the defendant was not entitled to charge. The defendant averred that: (i) it was given exemption by the Ministry of Housing and Local Government ('the Ministry') under the old s. 2(e) of the Act (now s. 2A) from 24 May 1983 to 22 May 1991; (ii) both parties agreed to the interest rates and late payment charges contained in the loan agreement; and (iii) the plaintiff, by paying the agreed instalments from 31 July 1987 to 31 May 1999, was estopped from challenging the validity of the agreement, unilaterally changing the agreed interest rates and claiming for a refund of RM260,940.57 from the defendant.

Held (dismissing the plaintiff's claim):

[1] On the facts, the evidence showed that the defendant was a recognised moneylender that was lawfully exempted by the Ministry from the provisions of the Act from 24 May 1983 to 22 May 1991. (p 106 d)

[2] On the totality of the evidence, the defendant was not prohibited from collecting the repayment of the loan, payment of agreed interest and late payment charges after 22 May 1991 in respect of those loan agreements executed during the exemption period. (pp 107 h & 108 a)

[3] The plaintiff was wrong in stating that the defendant, being a licensed moneylender, was prohibited from charging interest over and beyond as provided for under s. 22(1) of the Act. Since the defendant was a corporate body exempted from the provisions of the Act, it was therefore not bound by the Act and could contract on those interest rates over and above the rates as stipulated in the Act as long as the contracting parties have agreed to the same. (p 108 g-h)

[4] The plaintiff could not just rely on s. 75 of the Contracts Act 1950 and allege that the late payment charges was a penalty and hence irrecoverable. The late payment charges represented a genuine pre-estimate of the defendant's loss and damages arising out of the breach of contract by the plaintiff as the borrower. It was by no means exorbitant, harsh or unconscionable but served as a "reasonable compensation" to the defendant. The plaintiff still certainly needed to pay reasonable compensation to the defendant as damages for the loss of use of such arrears of instalments. Thus, the plaintiff had failed to discharge the burden of proving that the late payment charges was indeed a penalty. (p 111 d-f)

[5] Since the plaintiff had been a voluntary party to the agreement as borrower thereof since 1984 and had been repaying the loan, interest payments and late payment charges for close to 12 years, the plaintiff should be treated as having waived and abandoned her rights, and estopped from: (i) challenging her liability to pay for the agreed interests at 12.5% per annum with yearly rests (a rebate by the defendant) and late payment charges of 18% per annum; (ii) challenging the validity of the agreement; (iii) asking for the refund of the said sum of RM260,940.57 from the defendant; and (iv) asking for reliefs as stated in the statement of claim dated 10 March 2000. (p 111 g-i)

Case(s) referred to:

Bumiputra Merchant Bankers Bhd v. Meng Kuang Properties Bhd [1991] 1 CLJ 718; [1991] 2 CLJ (Rep) 375 HC ***(refd)***

Chellapah Rasadurai v. Selvadurai [1971] 2 MLJ 170 FC ***(dist)***

Realvest Properties Sdn Bhd v. The Co-operative Central Bank Limited (Under Receivership) [1996] 3 CLJ 823 FC ***(refd)***

Robophone Facilities Ltd v. Blank [1996] 1 WLR 1428 ***(refd)***

Sadhu Singh v. Sellathurai [1955] MLJ 117 ***(dist)***

Sundar Koer v. Sham Kishen [1906] 341 A 917 ***(refd)***

Terengganu State Economic Development Corporation v. Nadefinco Ltd [1982] 1 MLJ 365

Legislation referred to:

Contracts Act 1950, s. 75

Moneylenders Act 1951, ss. 2, 2A, 3, 5, 15, 21, 22(1)

Other source(s) referred to:

Cheshire, Fifoot and Furmston's Law of Contract, p 1036

Chitty on Contracts, 25th edn, para 28, pp 19-20

For the plaintiff - SK Sivam (Cik Shakila); M/s PG Lim & Co

For the defendant - SY Lai (Jaya Couri); M/s SY Lai & Assocs

Reported by Suresh Nathan

JUDGMENT

Zulkefli Ahmad Makinudin J:

Plaintiff's Claim

The following are the relevant facts in relation to the plaintiff's claim:

(1) The plaintiff took a loan of RM252,000 from the defendant to part finance the purchase of a condominium unit known as GCB Condominium, Jalan Ampang, Kuala Lumpur.

(2) The purchase price of the condominium unit was RM315,000. Plaintiff paid her own money of RM63,000 and borrowed balance of RM252,000 from defendant.

(3) Plaintiff entered into a Loan Agreement Cum Assignment ("the agreement") dated 9 May 1984 with defendant whereby as security for the said loan she assigned the said condominium to the defendant subject to the terms and conditions contained in the Loan Agreement Cum Assignment.

(4) The interest charged by the defendants for the said loan under the said agreement were:

(a) 14% per annum compound interest on monthly rests on all moneys advanced or released.

(b) default interest or late payment interest at 18% per annum compound interest in addition to (a) on the amount of each instalment.

(5) As at 30 June 1999, the state of the plaintiff's account with the defendant is as stated hereunder according to defendant's letter dated 22 May 1999:

		RM
	Loan Principal	252,000.00
(a)	Interest charged	511,510.11
(b)	Late payment charges	225,179.02
		988,689.13
	Less	
(c)	Repayment made	870,617.56
	Outstanding balance as at 30 June 1999 as per contention of defendant	118,071.57

(6) The plaintiff contends that the defendant does not have moneylending licence, and even if they have, which is not admitted, the defendant is not entitled to charge compound interest at 14% per annum and late payment charges at 18% per annum on compound interest basis.

(7) The plaintiff contends further that the said rates of interest and each of them and charging same on compound interest basis is excessive, harsh and unconscionable. The compound late payment interest charged is also a penalty.

(8) The plaintiff asserts further that the defendant is not entitled to charge compound interest and compound default interest or penalty interest.

(9) The plaintiff contends that she was charged interest and late payment interest from 1 August 1985 to 31 May 1997. Late payment interest was charged even though plaintiff had regularly paid the instalments during certain periods from July 1987 onwards.

Defence

The defence of the defendant *inter alia* are as follows:

(1) The Moneylenders Act 1951 ("the Act") does not apply to the defendant.

(2) The defendant was given exemption by the Ministry of Housing and Local Government under the old s. 2(e) of the Act (now s. 2A) in the three (3) letters from the Ministry to the defendant dated 26 May 1983 commencing from 24 May 1983 to 23 May 1986, dated 27 October 1986 commencing from 23 May 1986 to 22 May 1989 and finally dated 5 June 1989 commencing from 23 May 1989 to 22 May 1991.

(3) That all agreed interest rates and late payment charges contained in the Loan Agreement Cum Assignment dated 9 May 1984 ("agreement") are agreeable by both contracting parties *viz* the defendant as lender and the plaintiff as borrower.

(4) That the plaintiff had; by paying the agreed instalments from 31 July 1987 to 31 May 1999; is now estopped from:

(i) challenging the validity of the agreement;

(ii) denying the plaintiff's obligation to pay for the agreed interest and agreed late payment charges;

(iii) unilaterally changing the agreed interest rate from 14% per annum with monthly rests to simple interest at 12% per annum;

(iv) unilaterally changing the agreed interest rate on late payment charges compounded at 18% per annum to simple interest at 4% per annum;

(v) claiming for a refund of RM260,940.57 from the defendant; and

(vi) seeking for all the reliefs as stated in paras. 15(a) to (j) of the statement of claim dated 10 March 2000.

Decision Of The Court

Having studied the documentary evidence tendered by both the plaintiff and the defendant and the evidence of witnesses called by both parties, it is my decision that the plaintiff has failed on the balance of probabilities to prove her case in respect of the claim against the defendant. The plaintiff's claim is thereby dismissed with cost.

The following are my reasons in dismissing the plaintiff's claim:

Whether The Moneylenders' Act 1951 ("The Act") Applies To The Defendant

It is my view that the provision of the Act does not apply to the defendant in the present case. The defendant is a moneylender recognized by the Government (Ministry of Housing and Local Government). The old s. 2(e) of the Act provides as follows with regard to the meaning of the term "moneylenders":

> 'moneylenders' includes every person whose business is that of moneylending ... but does not include ... any body corporate or society for the time being exempted by the Minister ('Minister' means 'the Minister charged with responsibility for the control of moneylenders') by notification published in the Gazette from the provisions of this Ordinance (Moneylenders Act 1951).

As the said agreement was executed on 9 May 1984 which was during the exemption period, the agreement is hence valid binding and enforceable. It is my finding that by virtue of the said 3 letters as shown at pp. 1, 2 and 3 of Agreed Bundle of Documents (AB1), the defendant is a moneylender recognized by the Government of Malaysia and also a moneylender exempted from the Act during the exemption period.

The learned counsel for the plaintiff contended that in the present case the defendant has admitted to lending money and being in the business of lending and also admitted that it has no license under the Act. This being the case the provision of s. 15 of the Act is applicable. Section 15 of the Act provides as follows:

> No contract for the repayment of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.

For the plaintiff the two cases of *Chellapah Rasadurai v. Selvadurai* [1971] 2 MLJ 170 FC and *Sadhu Singh v. Sellathurai* [1955] 117 were cited to show the provision of the said s. 15 of the Act was in issue. The court therein held that the plaintiff in that two cases were unlicensed moneylenders and as such the claim was dismissed.

With respect I could not agree with the above contention of the plaintiff. The facts in the *Chellapah*'s and the *Sadhu Singh*'s cases are completely different from that of this present case. In that two said cases the courts had ruled that the lenders had on previous occasions lent money to the borrowers in consideration of a larger sums being repaid. That being the case the statutory presumption under s. 3 of the Act have arisen against the lenders. The lender in that two said cases are presumed to be money lenders without any s. 5

Moneylending license or exempted by the Minister. On the other hand the defendant in the present case was lawfully exempted by the Minister from the provisions of the Act from 24 May 1983 to 22 May 1991.

Whether The Defendants Were Exempted Under s. 2(e) Of The Moneylenders's Act 1951 By The Minister Of Housing & Local Government After 23 May 1991

The plaintiff has attacked on the legal capacity on the part of the defendant in the collection of the payment of the loan and the payment of the interest and the late payment charges beyond 22 May 1991. The plaintiff had referred to a letter dated 5 June 1989 from the Ministry to the defendant. This letter exempted the defendant from the Act for two (2) years from 23 May 1989. The second paragraph of the said letter states as follows:

> Kementerian ini juga ingin memaklumkan bahawa pengecualian yang diberi bagi kali yang terakhir. Ini bermakna jika sekiranya Syarikat tuan ingin meneruskan perniagaan sebagai pemberipinjam wang ia seharusnya memperolehi lessen pemberipinjam wang daripada pihak berkuasa yang berkenaan selepas tamat tempoh pengecualian di atas.

It is the contention of the plaintiff that the defendant did not obtain a moneylenders license after the expiry of the exemption on 22 May 1991. The defendants therefore cannot carry on moneylending after 22 May 1991. From June 1991 until 31 May 1999 the defendant have been collecting from the plaintiff the principle sum loaned, interest and late payment charges. The total sum collected during this period is RM819,857.56. This was the sum collected when the defendant had no moneylending license and no exemption from the Act. It is submitted for the plaintiff that these collections are illegal under s. 15 of the Moneylenders' Act. The plaintiff also contends that the defendant has been collecting interest plus late payment or penalty interest and this, it is submitted is illegal. The definition of interest is given in s. 2 of the Act as follows:

> ... any amount of whatever name called in excess of the principal paid or payable to a money lender in consideration of or otherwise in respect of a loan.

Contrary to the contention of the plaintiff, it is my view that it is clear upon a close examination of the said letter dated 5 June 1989 from the Ministry the defendant is only prohibited from engaging in the business of moneylending after the expiry of the exemption period unless a moneylending license is obtained by the defendant. Looking at the provision of the old s. 2(e) of the Act and the said 3 letters from the Ministry in its totality, it is my finding that the

defendant is not prohibited from collecting the repayment of the loan and payment of agreed interest and late payment charges beyond 22 May 1991 in respect of those loan agreements executed during the exemption period.

The plaintiff had only alleged that a sum of RM819,857.56 was paid by her to the defendant from June 1991 to 31 May 1999 which was after the exemption period and of which plaintiff claimed the defendant is not entitled to receive in law. But the plaintiff had not adduced any *viva voce* evidence to the effect that the defendant is prohibited from the business of collection beyond the exemption period. No officials from the Ministry was called to testify on her behalf so as to substantiate her contention. In the absence of such evidence it is my finding that the plaintiff's allegation had stood unsubstantiated and hence must fail.

It is to be stated that all the figures as contained in pp. 41-61 of AB2 (Appendix A and C) are not disputed. It is all along the contention of the defendant that all interest and late payment charges are levied pursuant to the agreement in which the terms and conditions have been mutually agreed upon in the absence of any vitiating factors.

The learned counsel for the plaintiff had also submitted on s. 15 of the Act and that the defendant's collection of interest and late payment charges is illegal. But I find that illegality is never pleaded in the statement of claim. Further no evidence as to "illegality" was ever adduced. Hence any submission on "illegality" must not be considered and accepted. What were pleaded were (1) mistake of fact and (2) compulsion and for that the plaintiff had failed to adduce any evidence to substantiate her contention of "mistake" and "compulsion".

Whether The Defendant Is Entitled To Charge Interest At 1.4% Per Annum Compound Interest Despite The Loan Having Been Secured By A Property

I am of the view that the plaintiff is wrong in stating that the defendant, being licensed moneylenders is prohibited from charging interest over and above the rate of 14% as provided for under s. 22(1) of the Act. It must be restated here that I have already made a finding that the defendant is not a licensed moneylender within the meaning of s. 5 of the Act. The defendant is a corporate body exempted from the provisions of the Act by the Minister pursuant to the old s. 2(e) of the Act. The defendant is therefore not bound by the Act and could contract on those interest rates over and above the rates as stipulated in the Act so long as same are mutually agreed upon by both contracting parties.

As regards the case of *Bumiputra Merchant Bankers Berhad v. Meng Kuang Properties Berhad* [1991] 1 CLJ 718; [1991] 2 CLJ (Rep) 375 cited for the plaintiff I find that it is only an authority on how the bank could capitalise the interest or compounding it. It is not an authority to state that exempted body under the old s. 2(e) of the Act could not levy compound interest and that only banks could do so. I take the view that the expression "exemption from the provisions of this Ordinance" has one and only one meaning in that the defendant is exempted from the provisions of the Act in their business of moneylending during the exemption period. Since the defendant is not bound by the Act I find that the submission by counsel for the plaintiff on the application of s. 21 of the Act whereby the court shall reopen the transaction and take account between the moneylender and the person sued and relieve the person sued from any excess sum and order the repayment of excess to the person sued must fail.

With regard to the issue of whether the plaintiff is contractually bound to pay the defendants interest at the rate of 14% per annum and default interest at the rate of 18% per annum I am of the view that these payments are as agreed by the plaintiff and defendants pursuant to the loan agreement. The defendant is entitled to charge default interest at 18% per annum as stipulated in cl. 5(c) of the Loan Agreement Cum Assignment dated 9 May 1984 between plaintiff and defendant. The case of *Terengganu State Economic Development Corporation v. Nadefinco Ltd.* [1982] 1 MLJ 365 is the authority whereby the Federal Court had ruled that if interest is agreed to be of yearly or monthly rests, then interest is chargeable on the outstanding sum to be computed on compound interest basis.

The document at p. 48 Appendix B of AB2 reveals that the total late payment charges since levied is RM225,179.02. The method of calculation as illustrated in para. 9.3 is indeed the proper mode of calculation adopted by the defendant which is contractually agreed upon in that 18% per annum on the then arrears of instalments is levied and then computed at compound interest on monthly rests. For example, a sum of RM437.98 was levied for June 1986 being as follows:

Arrears : RM29,604.30

Rate chargeable : 18% per annum on monthly rests

$$\text{therefore RM29,604.30} \times \frac{18}{100} \times \frac{30}{365}$$

= RM437.98 and the defendant is perfectly entitled to do so under the agreement which is not excessive, harsh and unconscionable. The plaintiff is to be solely blamed for her current predicament in that she should not be late in servicing her instalments from 1 June 1986 to 31 May 1997 (of 11 years) amounting to RM225,179.02 thereby entitling the defendant to levy the contractual late payment charges. At the very least, she should have heeded to the advise of DW1 the witness called for the defendant and applied for re-financing at other banks or finance companies if indeed such rates levied by the defendant are indeed excessive, harsh and unconscionable.

Paragraphs 9 and 10 of the statement of claim of the plaintiff aver that the defendant is not entitled to charge compound interest at 14% per annum and late payment charges ("LPC") at 18% per annum and that the latter is a penalty. On this point I find that the plaintiff has yet to discharge the burden of proving that notwithstanding the clear wordings of the letter of offer and the agreement, the defendant is not entitled to levy interest and that the LPC is indeed a penalty. Even if the LPC is a penalty it should not be a ground to nullify the agreement.

It is to be noted that subsequent to the defendant's letter to the plaintiff dated 9 May 1988 as at p. 32 of AB2, the defendant had indeed levied interest at 12.5% per annum with yearly rests instead of 14% per annum with monthly rests effective 1 May 1988 (refer to p. 46 of AB2 (Appendix A – Schedule of Interest Charged by GFC) and totalling RM511,510.11. Despite the rebate having been given by the defendant to the plaintiff, the plaintiff still contends that the defendant is not entitled to levy such agreed rates and that the computation adopted was wrong and the rates are harsh, excessive and unconscionable. The plaintiff has failed to plead or adduce evidence or submit of what is the correct method of computation. The answer is quite obvious in that the plaintiff could not find ways to circumvent on those rates and computation which have since been mutually agreed upon.

As regards the contention of the plaintiff that the prescribed interest, default interest and the manner of calculating are harsh, unconscionable and substantially unfair, I find that there is no evidence adduced by the plaintiff to indicate that the LPC is a penalty. On this point I would like to refer to *Cheshire, Fifoot and Furmston's Law of Contract* at p. 1036 wherein it states *inter alia* that the onus of showing that the specified sum is a penalty lies upon the party who is sued for his recovery. (See the case of *Robophone Facilities Ltd, v. Blank* [1996] 1 WLR 14281. The learned counsel for the plaintiff has cited the case of *Realvest Properties Sdn. Bhd. v. The Co-operative*

Central Bank Limited (Under Receivership) [1996] 3 CLJ 823 to support the contention of the plaintiff whereby the Federal Court had held *inter alia* that the provision for default interest is a stipulated payment in terrorem of the party breaching the contract. I find that the facts in *Realvest Properties Sdn. Bhd*'s case can be distinguished from the present case. In the present case the LPC is a genuine pre-estimate of the defendant's loss for breach of contract (in servicing the instalments late) by the plaintiff. On this point it is necessary to quote a passage from the decision of the *Realvest* at p. 825 where it is stated as follows:

> In a default such as happened here, there is an established measure of damages payable by the borrower which is damages for loss of use of fund or money. This was due to the fact that the sum in arrears, if it had not have been lent to some other person by the chargee (lender) at certain interest for a period which it was in arrears.

The LPC is levied as from the date of default and not as from the date of the loan documentation: (See the Privy Council case of *Sundar Koer v. Sham Kishen* [1906] 341 A 917). I am of the view that the plaintiff just could not simply fall on s. 75 of the Contracts Act 1950 and allege that the LPC is a penalty and hence irrecoverable. The LPC is certainly a liquidated damage which represents a genuine pre-estimate of the defendant's loss and damages arising out of the breach of contract by the plaintiff as borrower. It was by no means exorbitant, harsh or unconscionable but serves as a "reasonable compensation" to the defendant as illustrated in Illustration (d) of the said s. 75 of the Contract Act. The plaintiff still certainly needs to pay reasonable compensation to the defendant as damages for the loss of use of such arrears of instalments. It is my finding that the plaintiff had failed to discharge the burden of proving that the LPC is a penalty meant to be a stipulated payment in terrorem and hence all submission on this issue must fail.

Finally, I am of the view that the fact that the plaintiff had been a voluntary party to the agreement as borrower thereof since 1984 and had been repaying the loan and payment of the interest and late payment charges from 31 July 1987 to 31 May 1999 for close to 12 years the plaintiff should be treated as having waived and abandoned her rights and she is now estopped from:

(i) challenging her liability to pay for the agreed interest at 12.5% per annum with yearly rests and late payment charges of 18% per annum.

(ii) challenging the validity of the agreement.

(iii) asking for the refund of the said sum of RM260,940.57 from the defendant.

(iv) asking for those reliefs as stated in paras. 15(a) to 15(j) of the statement of claim dated 10 March 2000.

By the plaintiff's execution of the said agreement in which all the interest rate and late payment charges have been expressly stated in such clear and unambiguous terms, she had therefore waived and abandoned her rights to challenge (i) the capacity of the defendant as a moneylender and (ii) the said rates by continuing servicing the monthly instalments for a period of close to 12 years from 31 July 1987 to 31 May 1999. There is therefore no valid cause of action by the plaintiff against the defendant or at all. On this point I would like to quote a passage from the book *Chitty on Contracts*, 25th edn at para. 28 at pp. 19-20 wherein *inter alia* it states as follows:

> A party who executes a deed is estopped in a Court of Law from saying that the facts in the deed are not truly stated ... When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all ... First, it applies between the parties to the deed and those claiming through them; secondly, it applies when an action is brought to enforce rights arising out of the deed and not collateral to it; thirdly, it only applies when a statement is clear and unambiguous ...